No. 17-494

In the
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., and NEWEGG, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF FOR *AMICI CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION, AMERICANS FOR PROSPERITY, FREEDOMWORKS, FREEDOM PARTNERS CHAMBER OF COMMERCE, AND INSTITUTE FOR POLICY INNOVATION IN SUPPORT OF RESPONDENTS

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

April 4, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 2
ARGUMENT 6
I. This Case Implicates Core Constitutional Concerns About The Power Of States To Regulate Beyond Their Own Borders 6
A. Constitutional Constraints on States' Power to Regulate Extraterritorially Are Vital Safeguards of Liberty 6
B. The Constitution Imposes Several Mutually Reinforcing Limits on States' Power to Regulate Extraterritorially 11
C. The Power of States to Regulate Nonresidents Is Squarely at Issue Here ... 14
II. The Court Should Preserve Both Commerce Clause And Due Process Limits On States' Power To Regulate Beyond Their Borders 18
A. The Physical Presence Rule of *Bellas Hess* and *Quill* Should Be Preserved 18
B. If the Court Is to Reconsider the *Bellas Hess* Rule, It Should Also Reconsider Whether Other Constitutional Constraints Compel the Same Result 25
C. At a Minimum, the Court Should Reaffirm the Critical Due Process Constraints on States' Power to Regulate Beyond Their Borders 28
CONCLUSION 35

TABLE OF AUTHORITIES

Cases

ALS Scan, Inc.
v. Dig. Serv. Consultants, Inc.,
293 F.3d 707 (4th Cir. 2002) 31

Austin v. New Hampshire,
420 U.S. 656 (1975) 12

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 3, 8, 12, 13

Bonaparte v. Appeal Tax Court of Balt.,
104 U.S. 592 (1881) 3

Bond v. United States,
564 U.S. 211 (2011) 7, 8, 13

Boschetto v. Hansing,
539 F.3d 1011 (9th Cir. 2008) 30

Brentwood Acad.
v. Tenn. Secondary Sch. Athletic Ass'n,
531 U.S. 288 (2001) 32

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 30

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 17

Camps Newfound/Owatonna, Inc.
v. Town of Harrison,
520 U.S. 564 (1997) 11

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 15

Daimler AG v. Bauman,
134 S. Ct. 746 (2014) 27

Dep't of Revenue of Mont. v. Kurth Ranch,
511 U.S. 767 (1994) 26

Edgar v. MITE Corp.,
457 U.S. 624 (1982) 10, 13

Evans v. Norton,
382 U.S. 296 (1966) 33

Gregory v. Ashcroft,
501 U.S. 452 (1991) 9

Griffith v. ConAgra Brands, Inc.,
728 S.E.2d 74 (W. Va. 2012) 19

Hanson v. Denckla,
357 U.S. 235 (1958) 30

Healy v. Beer Inst., Inc.,
491 U.S. 324 (1989) 13, 17, 27

Hudson v. United States,
522 U.S. 93 (1997) 26

J. McIntyre Mach., Ltd. v. Nicastro,
564 U.S. 873 (2011) 8, 29, 30

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 30

McCulloch v. Maryland,
17 U.S. 316 (1819) 10

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957) 29

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 9, 20

Nat'l Geographic Soc'y
v. Cal. Bd. of Equalization,
430 U.S. 551 (1977) 26

Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.,
386 U.S. 753 (1967) 1, 6, 14

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 24

New York v. United States,
505 U.S. 144 (1992) 4, 9

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 23

Paul v. Virginia,
75 U.S. (8 Wall.) 168 (1868) 12

Payne v. Tennessee,
501 U.S. 808 (1991) 22

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 12

Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.,
153 F.3d 938 (9th Cir. 1998) 18

Powell v. McCormack,
395 U.S. 486 (1969) 9

Printz v. United States,
521 U.S. 898 (1997) 10

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Sam Francis Found. v. Christies, Inc.,
784 F.3d 1320 (9th Cir. 2015) 27

Scripto, Inc. v. Carson,
362 U.S. 207 (1960) 26

Shaffer v. Heitner,
433 U.S. 186 (1977) 8

Toys "R" Us, Inc. v. Step Two, S.A.,
318 F.3d 446 (3d Cir. 2003) 30, 31

Travis v. Yale & Towne Mfg. Co.,
252 U.S. 60 (1920) 12

Trintec Indus., Inc.
v. Pedre Promotional Prods., Inc.,
395 F.3d 1275 (Fed. Cir. 2005) 32

Union Refrigerator Transit Co. v. Kentucky,
199 U.S. 194 (1905) 7, 10

United States v. Halper,
490 U.S. 435 (1989) 26

Woodruff v. Parham,
75 U.S. (8 Wall.) 123 (1868) 11

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 8

Constitutional Provisions

U.S. Const. amend. XIV 28

U.S. Const. art. I 11

U.S. Const. art. IV 11

Other Authorities

Joe Bailey et al., *The Long Tail Is Longer Than You Think: The Surprisingly Large Extent of Online Sales by Small Volume Sellers* (May 12, 2008) (unpublished working paper) (on file with the University of Maryland) 32

Joseph Bishop-Henchman, *Why the* Quill *Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction* (Nov. 5, 2007), https://bit.ly/2GFZO6C 19

Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis* (2018), https://bit.ly/2GvnwTP 21

2 Debates on the Federal Constitution (J. Elliot ed. 1876) 9

Declaration of Independence (U.S. 1776) 3, 9

Allan Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493 (2008) 8

The Federalist No. 46 (James Madison) (Jacob E. Cooke ed., 1961) 9

Holger P. Hestermeyer, *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 Nw. J. Int'l L. & Bus. 267 (2006) 16

Hayes R. Holderness, *Questioning* Quill, 37 Va. Tax Rev. 313, 341 (2018) 19

H.R. 5660, 111th Cong. (2010) 24

Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979) 9

Steven Malanga, *The State Tax Grab*, City Journal (Winter 2014), https://bit.ly/2H7IPYG 17

Tony Mauro, *How Supreme Court's Internet Tax Case Was Built 'From the Ground Up'*, Nat'l L. J. (Mar. 16, 2018), https://bit.ly/2q1Af67 33

Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468 (2007) 11

S. 1736, 108th Cong. (2003) 24

S. 1832, 112th Cong. (2011) 24

Elizabeth Shell, *California Humane Chicken Law Ruffles Feathers in Other States*, PBS News Hour (Mar. 7, 2014, 6:29 PM), http://to.pbs.org/2FI2rnV 17

U.S. Census Bureau, CB18-21, *Quarterly Retail E-Commerce Sales: 4th Quarter 2017* (Feb. 16, 2018), http://bit.ly/1bYLlrv 21

STATEMENT OF INTEREST[1]

In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), this Court held that states may not conscript out-of-state retailers into collecting and remitting state sales and use taxes on pain of penalty. The Court reaffirmed that principle 25 years later in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in the face of claims that times had changed and *Bellas Hess* had become outmoded. Although *Quill* concluded that imposing tax-collection obligations on remote vendors that have purposefully availed themselves of a state does not violate the Due Process Clause, *Quill* reaffirmed that—absent authorization by Congress—the Commerce Clause precludes states from imposing tax-collection obligations on individuals and businesses with no physical presence in the state. Justice Scalia wrote separately to underscore that the case for retaining the Commerce Clause ruling of *Bellas Hess* was particularly compelling given Congress' undoubted authority to "change the rule of *Bellas Hess* by simply saying so." *Id.* at 320 (Scalia, J., concurring in part and concurring in the judgment).

Amici curiae are non-profit, non-partisan organizations that share a commitment to the promotion and protection of individual liberty. The National Taxpayers Union Foundation, a research

---

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them, has worked extensively to analyze and provide testimony about the central questions contemplated by this case. Americans for Prosperity is a grassroots organization with over 3.2 million activists nationwide advocating for the principles of a free and open society, including federalism and a limited government in concert with the U.S. Constitution. FreedomWorks is a grassroots organization that seeks to educate citizens on, and promote the adoption of, free-market policies that inure to the benefit of consumers and citizens generally. Freedom Partners Chamber of Commerce and its members support free enterprise, fiscal responsibility, and fair markets. Finally, the Institute for Policy Innovation is a think tank founded to research, develop, and promote innovative and non-partisan solutions to today's public policy problems.

Amici share the conviction that while business models change, first principles remain constant. No taxation without representation was among the core principles on which the Republic was founded. It is no less vital today than when a distant power yielded to the temptation to over-tax colonists who lacked any effective voice in London. *Amici* write principally to ensure that these first principles are not overlooked in a debate about maximizing state tax revenue.

SUMMARY OF ARGUMENT

While this case undoubtedly is about sales and use taxes, it is about much more. It is about power. It is more particularly about the power of government to tax, to collect the tax, and in the event of non-

compliance, to bring the law enforcement power of government to bear on nonresident individuals and companies with no voice in the polity.

The Framers could not have anticipated the Internet, Amazon.com, or the notion that Amazon would belatedly recognize the benefits of physical presence and build a brick-and-mortar bookstore in Georgetown. But the Framers needed no crystal ball to foresee the prospect that a distant sovereign might impose taxes or regulatory burdens on those without representation in the halls of the government. That reality stared the Framers in the face, and they were not indifferent. They dumped tea in the harbor; filed petitions, memorials, remonstrances, and declarations; and ultimately fought a revolution to prevent taxation without representation.

The Framers did not fight a revolution to redress the "Injuries and Usurpations" of a distant sovereign, including particularly "imposing Taxes on us without our Consent," Declaration of Independence paras. 2, 19 (U.S. 1776), only to write a Constitution that allowed comparable injuries and usurpations to be replicated. It is thus no surprise that it is a bedrock principle of constitutional law that a state may not "legislate except with reference to its own jurisdiction." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (quoting *Bonaparte v. Appeal Tax Court of Balt.*, 104 U.S. 592, 594 (1881)).

That limitation is reflected in numerous constitutional provisions, including the Due Process Clause, the Commerce Clause, and the Import-Export Clause. And like other structural protections in our Constitution, that limitation serves the foundational

purposes of ensuring that sovereign power derives "from the Consent of the Governed," Declaration of Independence para. 2, and securing "the liberties that derive from the diffusion of sovereign power," *New York v. United States*, 505 U.S. 144, 181 (1992). Accordingly, while a state certainly has the power to impose taxes on its in-state residents, its power to force out-of-state retailers with no voice in the state's political process to serve as the state's private tax collector is another matter entirely. The physical presence rule that this Court established in *Bellas Hess* and reaffirmed in *Quill* continues to serve as a vital limit on that power.

Petitioner's myopic focus on the purportedly decreased burdens remote retailers face in collecting taxes for distant states thus misses the mark. The principal objection to the Stamp Act and the Tea Act was not that collecting the taxes was burdensome. The problem was far more fundamental—namely, that the burdens were imposed by a distant Parliament in which the colonists were denied representation. Here, too, the problem with imposing tax-collection responsibilities on out-of-state entities with no voice in the halls of state government is not principally about whether the latest software lessens the burdens of compliance with such responsibilities. Whether tax-collection responsibilities are easy or hard, they are politically unpopular. After all, nothing in the Constitution stops states from doubling down on efforts to collect sales taxes on in-state residents. What curtails states' own enforcement efforts directed to in-state residents is not a constitutional limit, but the ballot box. How convenient and tempting, then, to impose those collection obligations on out-of-state (or

even out-of-nation) retailers who cannot vote. And since the ballot box imposes no constraint on offloading enforcement obligations on nonresidents, only the Constitution prevents states from yielding to that temptation.

The physical presence rule of *Quill* and *Bellas Hess* protects these critical constitutional values. While there are plausible arguments that other constitutional provisions might better protect these values as an original matter, the physical presence rule has a distinct and weighty consideration to recommend it: It has been the law of the land for half a century and survived a previous effort to overturn it. Indeed, the *stare decisis* considerations Justice Scalia identified 25 years ago have even more force today, as hundreds of thousands of private parties have ordered their affairs in reliance on that rule in the more than two decades since this Court declined the last state's plea to abandon it. And while South Dakota's made-for-this-litigation statute imposes only prospective tax-collection obligations, there is nothing in the logic of its position to prevent retroactive burdens, and other states have already made clear that they will not exercise such restraint.

Finally, as Justice Scalia emphasized, this case is a particularly poor candidate for jettisoning *stare decisis* because Congress has the power to address petitioner's concerns. That Congress, a body in which out-of-state entities have equal representation, has so far declined impassioned pleas to override the physical presence rule should give this Court serious pause about overruling one of its precedents based on public policy arguments that are much better suited for

resolution by a political process in which all affected parties have a voice.

But however this Court resolves the question presented, it should make clear that states do not have free rein to regulate beyond their own borders. The Commerce Clause is not and has not ever been the only constitutional constraint on that power. Indeed, if the Court is inclined to reconsider the Commerce Clause without regard to *stare decisis*, it should afford the same treatment to the Due Process Clause. As an original matter, there is no valid reason to allow a state to impose regulatory tax-collection responsibilities on an out-of-state retailer without either a physical presence or a voice in the jurisdiction. And even if this Court does not fully reconsider the due process limits on states imposing such collection responsibilities, it should at least reaffirm that the Due Process Clause imposes meaningful limits that protect individuals and businesses from the long arm of governments in which they have no political voice.

ARGUMENT

I. This Case Implicates Core Constitutional Concerns About The Power Of States To Regulate Beyond Their Own Borders.

A. Constitutional Constraints on States' Power to Regulate Extraterritorially Are Vital Safeguards of Liberty.

The question in this case is whether a state has the "power to deputize an out-of-state retailer as its collection agent for a use tax" imposed on an in-state resident. *Bellas Hess*, 386 U.S. at 757. Rather than focus on that question as a constitutional matter, petitioner and its *amici* stress the dangers that the

Internet poses to state tax revenues and champion the promise of newfangled software in easing the burdens of compliance with a vast array of shifting tax-collection obligations. Those arguments are seriously flawed even on their own terms, *see, e.g.*, Respondents' Br. 30-38; Br. of *Amici Curiae* eBay et al. 6-16, but petitioner's focus on modern technology obscures the reality that the basic problem in this case is older than the Republic. The Framers well understood the problems with a distant sovereign imposing taxes and regulatory burdens on far-removed subjects with no voice in the halls of government. No taxation without representation became a rallying cry in the revolution, and the Framers did not forget that fundament of liberty when it came to writing the Constitution.

Specific provisions of the Constitution limit the states' ability to tax out-of-state entities, lest taxation without representation recur in the new Republic. And this Court has long identified a complementary structural limit on the ability of states to regulate extraterritorially. These limitations, like other structural aspects of the Constitution, are critical safeguards of individual liberty. *See Bond v. United States*, 564 U.S. 211, 221-22 (2011). After all, as this Court observed over a century ago, if taxes are imposed on those without presence or voice in the taxing jurisdiction, the imposition "partakes rather of the nature of an extortion than a tax." *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 202 (1905).

While the allocation of power in our federal system is most often articulated in terms of "the prerogatives and responsibilities of the States and the

National Government vis-à-vis one another," *Bond*, 564 U.S. at 221, the federal-state divide is not federalism's only axis. "The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty coequal states that must peaceably coexist." Allan Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493, 494 (2008). The Framers "intended that the States retain many essential attributes of sovereignty," and the "sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). That limitation takes many forms, but one is paramount: Because "each State has a sovereignty that is not subject to unlawful intrusion by other States," *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion), "[n]o State can legislate except with reference to its own jurisdiction," *Gore*, 517 U.S. at 571.

This territorial constraint "is, in part, an end in itself," as it "ensure[s] that States function as political entities in their own right." *Bond*, 564 U.S. at 221. Indeed, "any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977). But that limitation "is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond*, 564 U.S. at 221. It also "secures to citizens the liberties that

derive from the diffusion of sovereign power." *New York*, 505 U.S. at 181.

Federalism's horizontal axis protects individual liberty in a number of ways. First, it "makes [each state] government more responsive," *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), by helping ensure that citizens can correctly attribute government actions to their proper source. Blurring of political responsibility undermines the value of a citizen's right to select the policies and priorities he wishes to pursue. *See* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 890 (1979). More fundamentally, if the voting public does not know whom to blame (or thank) for public policy decisions, then the governed—"the ultimate authority" in our constitutional system, The Federalist No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961)—cease to be the masters of the governors. *See Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them." (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876))).

Conversely, confining the states' regulatory and taxing power to their own respective spheres ensures that the power of government derives from "the consent of the Governed." Declaration of Independence para. 2. In contrast to the federal government, "the Constitution is not the source of the[States'] power." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J.). States derive their authority from the people themselves. But the relevant "people" underlying a

state's authority consist only of persons actually represented by the state—*i.e.*, those who can exercise political will in the jurisdiction and to whose political activity the state government will respond. *See Printz v. United States*, 521 U.S. 898, 920 (1997) (state governments "represent and remain accountable to [their] own citizens"); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (plurality opinion) ("the State has no legitimate interest in protecting nonresident[s]").

Confining a state's regulatory and taxing authority to those within its jurisdiction ensures that the state's power is constrained by the will of the governed. Taxes, and even more so the regulatory responsibility for collecting them, are unpopular and if unconstrained have the "power to destroy." *See McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). It is thus critical that states impose taxes and tax-collection obligations only on those who can constrain this dangerous and unpopular power at the ballot box. Moreover, limiting taxes and tax-collection obligations to those in the jurisdiction ensures that the basic bargain implicit in taxation is honored. "The power of taxation," while indispensable, "is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property." *Union Refrigerator*, 199 U.S. at 202. But if taxation is rendered on property or persons outside the jurisdiction and who "owe an allegiance" to, and "look[] for protection" from, other states, the imposition "partakes rather of the nature of an extortion than a tax." *Id.*

B. The Constitution Imposes Several Mutually Reinforcing Limits on States' Power to Regulate Extraterritorially.

Consistent with the core federalism objectives it advances, "[t]he principle that states are territorially bound ... permeates the Constitution." Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1520 (2007). It "finds explicit textual manifestation in the New State Clause's protection of an existing state's territory." *Id.*; *see* U.S. Const. art. IV, §3, cl. 1 ("[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."). And it is a common thread uniting this Court's interpretation of several constitutional provisions.

For instance, the Import-Export Clause, U.S. Const. art. I, §10, cl. 2, limits the power of states to impose tax burdens on outsiders through duties and tariffs. While the Court has limited that provision to tariffs levied against foreign nations, *see Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868), there is a powerful original argument that the Clause prohibits such taxes on goods from sister states of the union. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); Br. of Professor John S. Baker, Jr. as *Amicus Curiae* Supporting Neither Party ("Baker.Br.").

In addition, one of the central purposes of the Privileges and Immunities Clause of the Fourteenth

Amendment is to guard against the possibility that a state might exploit nonresidents' lack of meaningful representation in the political process to pass laws that specifically disadvantage them. *See Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920) (Privileges and Immunities Clause "place[s] the citizens of each state upon the same footing with citizens of other states" by "reliev[ing] them from the disabilities of alienage in other states" and "inhibit[ing] discriminating legislation against them by other states." (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868))). By preventing the exercise of one state's power to disadvantage residents of another, the Clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975).

The Due Process Clause likewise imposes territorial constraints on the states' regulatory power. As this Court has long explained, "the requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *see also, e.g.*, *Gore*, 517 U.S. at 572 (states may not punish out-of-state conduct that was lawful where it occurred). And while it is often discussed in terms of the power of state courts to adjudicate disputes involving nonresidents, due process is not concerned solely with the exercise of state judicial authority. "The limits on a State's power to enact substantive legislation" that applies to persons or property beyond its border "are similar to

the limits on the jurisdiction of state courts." *Edgar*, 457 U.S. at 643 (plurality opinion).

Finally, consistent with the Framers' "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres," "the Commerce Clause protects against ... the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-37 (1989) (footnote omitted). To that end, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 336. Indeed, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature" and regardless of the statute's effect on interstate commerce. *Id.*

In short, "one State's power to impose burdens on" nonresidents "is not only subordinate to" Congress' powers to regulate interstate commerce and to tax and spend, "but is also constrained by the need to respect the interests of other States." *Gore*, 517 U.S. at 571. And just as efforts by the federal government to eschew the limits on its powers inevitably threaten the liberty of the people, *see Bond*, 564 U.S. at 222, any attempt by one state to enlarge its jurisdiction at the expense of another is antithetical to the freedoms our constitutional system is designed to protect.

C. The Power of States to Regulate Nonresidents Is Squarely at Issue Here.

The Constitution's concern with extraterritorial state legislation is squarely at issue here. While petitioner proceeds as if this case were about a state's power to impose sales or use taxes on in-state transactions, that is decidedly not what this case is about. The Constitution gives states a free hand to impose sales and use taxes on state residents and to use their own forces to collect them. What constrains the states in those collection efforts is not the Constitution, but the ballot box. And to avoid the constraints of the ballot box and the inherent unpopularity of tax collection, states have long strived to offload those collection responsibilities on third parties. What this case is about, then, is the extent to which the Constitution constrains the "State's power to deputize an out-of-state retailer as its collection agent for a use tax" imposed on an in-state resident. *Bellas Hess*, 386 U.S. at 757. The need to constrain the ability to offload that unpopular state function on out-of-state retailers who do not vote or have a say in the polity is obvious.

The states' deputization power is no broader than any other power a state possesses to regulate those outside its borders. Indeed, there are many reasons to think it should be far narrower. Not only does extraterritorial regulation impose a particularly unpleasant responsibility on out-of-state retailers; it creates an admixture of state and private authority that poses its own threat to liberty. Moreover, treating participation in interstate commerce as sufficient to subject out-of-state actors to the

regulatory power of 50 different states (not to mention countless local jurisdictions and the federal government) is not just an imposition on individual liberty, but a powerful impediment to interstate commerce.

Petitioner's myopic focus on how much easier it purportedly now is for retailers to collect taxes for remote jurisdictions thus misses the more fundamental point. To be sure, the burdens of complying with a state regulation are relevant to whether that regulation "discriminate[s] against interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). But the principal objection to the Stamp Act and the Tea Act was not that compliance and collection were difficult. The objection was far more fundamental—namely, that a distant sovereign with no political accountability to the governed had no business imposing a tax on the colonies. It was the very definition of tyranny, and a violation of the fundamental norm that legitimate authority derives from "the consent of the Governed."

Given the history of our founding, it should be self-evident that concerns with extraterritorial regulation by states do not fall by the wayside just because a tax is involved. Indeed, even without that history, "[i]t is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax." *Quill*, 504 U.S. at 319 (Scalia, J., concurring in part and concurring in the judgment). Thus, even accepting the deeply flawed premise that conscripting remote sellers into service as state tax collectors would be less burdensome today than it would have been 25 years ago, *but see* Respondents'

Br. 30-38; Br. of *Amici Curiae* eBay et al. 6-16, decreased administrative burdens on the regulated do not invariably translate into increased power to regulate out-of-state participants in interstate commerce.

To take just one of countless examples, it is undoubtedly easier today than it was 25 years ago for oil and gas enterprises to identify and decipher the environmental regulations of distant jurisdictions. But surely that does not mean that California may now regulate how gas can be extracted in El Paso or how rigs can be constructed in Abilene—even if some of the oil produced in Texas may end up being sold in Los Angeles. Of course, California is free to regulate its own residents and their energy purchases, just as South Dakota is free to impose on and collect from its own residents sales and use taxes. But the state's power to regulate the out-of-state conduct of out-of-state actors remains a horse of a very different color.

Indeed, if anything, the advent of the Internet makes the constitutional constraints on extraterritorial state regulations more important, not less. "Information posted online is accessible worldwide," Holger P. Hestermeyer, *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 Nw. J. Int'l L. & Bus. 267, 267 (2006), and modern communication tools can effectively shrink geographic barriers to essentially nil. Accordingly, without a robust constitutional constraint on the power of states to regulate out-of-state actors, *every* jurisdiction could fairly claim the power to regulate nearly *everything* that finds its way into the state via the Internet—not to mention the

contents of remotely hosted webpages themselves. Giving 50 separate states free rein to impose 50 separate sets of rules governing the Internet is a recipe for precisely the sort of regulatory chaos the Constitution was designed to avoid. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring in the judgment) (state law "must be evaluated not only by considering the consequences of the statute itself, but also by considering ... what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation" (alteration in original) (quoting *Healy*, 491 U.S. at 336)).

And the Internet is hardly the only channel of interstate commerce that states have tried to leverage to justify regulation of nonresidents. Nebraska recently assessed a business tax on a trucking company with no employees, no property, no inventory, and no sales in the state simply because the business had admitted its employees had driven through the state. Steven Malanga, *The State Tax Grab*, City Journal (Winter 2014), https://bit.ly/2H7IPYG. And California has effectively regulated the size of hen cages in other states by denying access to the California market for any producer not meeting its standards, sparking a legal battle with other states. Elizabeth Shell, *California Humane Chicken Law Ruffles Feathers in Other States*, PBS News Hour (Mar. 7, 2014, 6:29 PM), http://to.pbs.org/2FI2rnV.

Petitioner's suggestion that modern technology should make this Court *less* concerned about extraterritorial state regulation thus gets things

exactly backward. That the realities of interstate commerce today have loosened the traditional reins on regulation of remote actors only reinforces the need for this Court to continue to impose meaningful restrictions on the states' power to regulate beyond their own borders.

II. The Court Should Preserve Both Commerce Clause And Due Process Limits On States' Power To Regulate Beyond Their Borders.

A. The Physical Presence Rule of *Bellas Hess* and *Quill* Should Be Preserved.

1. Petitioner identifies no compelling reason to jettison the rule that states may not impose tax-collection obligations on sellers who lack a physical presence within their borders. As this Court concluded the last time it confronted the question, "the bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause" by enforcing the "substantial nexus" prong of the *Complete Auto* test and "demarcati[ng] ... a discrete realm of commercial activity that is free from interstate taxation." *Quill*, 504 U.S. at 314-15. This Court has decided more than a dozen dormant Commerce Clause cases since *Quill*, and not one of them undermines that conclusion.

To the contrary, the physical presence rule continues to provide a bright-line rule that both protects interstate commerce from undue burdens and confines states to their appropriate regulatory spheres. It also serves the critical end of ensuring predictability for commercial actors. *See, e.g.*, *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Cal.*, 153 F.3d 938, 943 (9th Cir. 1998) (recognizing "the importance of predictability to commercial

relations"). Whatever else may be said about it, the *Bellas Hess* rule is not is difficult to understand or follow. Indeed, petitioner does not seriously claim otherwise, but instead only notes that recalcitrant states are trying to muddy clear waters by "push[ing] the envelope" on what qualifies as "physical." Petitioner's Br. 32.

As those efforts to chip away the physical presence rule underscore, "an amorphous test" divorced from physical presence would be "practically useless in aiding an out-of-state entity in planning for its tax liability arising from its economic contact with [a] State," *Griffith v. ConAgra Brands, Inc.*, 728 S.E.2d 74, 86-87 (W. Va. 2012) (Benjamin, J., concurring), and would inevitably force at least some businesses to abandon certain markets or business activities to ensure that they would not be not roped into onerous new tax-collection obligations and the compliance costs that come with them. Indeed, even one of the *amici* supporting petitioner's position has previously warned that "[o]verruling the *Quill* rule would usher in decades of confusion, running the risk of damaging the national economy." Joseph Bishop-Henchman, *Why the* Quill *Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction* (Nov. 5, 2007), https://bit.ly/2GFZO6C.

That is particularly true given the consequences of noncompliance with state tax-collection obligations. Even beyond being subject to audit—which is no minor burden, *see* Hayes R. Holderness, *Questioning* Quill, 37 Va. Tax Rev. 313, 341 (2018) ("[a]udits can be costly and time-consuming, and may result in additional liability for the collector")—failure to collect and remit

taxes may leave a business deprived of property and an individual deprived of liberty. Indeed, sanctions for failing to collect and remit taxes owed "can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 573 (opinion of the Court). Those very real consequences of extraterritorial state tax-collection laws are no less an impediment to interstate commerce today than they were when this Court decided *Quill*.

2. Petitioner does not even attempt to identify any aspect of this Court's dormant Commerce Clause jurisprudence that has changed in any material way since *Quill*. Instead, petitioner and its *amici* contend that it is the times that have changed, and that the physical presence rule is not well-suited to the Internet age. But that argument is doubly mistaken. First, e-commerce is rapidly changing in ways that make the overruling of *Quill* less pressing and the virtues of deferring to Congress more obvious. Second, the changing nature of the Internet does not ameliorate the age-old problem of government imposing burdens on those without a voice in the polity.

As to the first point, much of petitioner's brief is addressed to the technology of five years ago, not the reality of Amazon opening a brick-and-mortar bookstore in Georgetown, paying taxes in every state

with a sales tax, and having multiple states use their precious tax revenues to lure Amazon to construct a second headquarters in their borders. And this phenomenon is not limited to Amazon. The world of e-commerce and traditional commerce are merging, with e-retailers recognizing the value of physical presence and quick distribution, and traditional brick-and-mortar retailers understanding the importance of an online presence. In fact, nine of the ten top e-retailers maintain heavy brick-and-mortar presences across the country. *See* Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis*, 13-14 & n.22 (2018), https://bit.ly/2GvnwTP. That is not to say that the quickly changing world of e-commerce has entirely eliminated the problem petitioner seeks to address. But the reality that the highest volume e-commerce sites have physical presences in most jurisdictions certainly changes the scope of the problem.[2]

It also underscores the virtues of leaving this problem to Congress. The e-commerce dynamic of 2018 is different from the dynamic of 2008 or 2013, and inevitably will be different from the dynamic of 2023. Congress has the power to address this issue with a targeted solution for 2018 and then revisit the issues when e-commerce takes the next unpredictable turn. This Court has no comparable luxury. It faces

---

[2] So does the reality that e-commerce comprises less than 10 percent of all commerce in the United States. *See* U.S. Census Bureau, CB18-21, *Quarterly Retail E-Commerce Sales: 4th Quarter 2017* (Feb. 16, 2018), http://bit.ly/1bYLlrv. More than 90 cents of every retail dollar is still spent in brick-and-mortar stores, which already collect and remit taxes to jurisdictions in which they have a physical presence.

a binary choice between retaining or abandoning the physical presence requirement, which has stood for decades as a bright-line bulwark against states imposing regulatory burdens on those without a meaningful presence in the forum.

Equally important, the rapidly evolving nature of the Internet does nothing to remedy the fundamental problem of states imposing regulatory burdens on those without any voice in the burden-imposing polity. Indeed, the difference between a small Internet retailer and a large-scale mail-order catalog only exacerbates the potential for taxation without representation. A large-scale mail-order catalog at least makes a conscious decision to send its catalogs into particular states with the hope of attracting out-of-state customers. A small Internet retailer, by contrast, may not even have out-of-state customers in mind when it sets up a website. *See infra* 30-33. And the minimal volume of business it does in another state is unlikely to give it any political clout whatsoever. E-commerce thus serves principally to even further distance out-of-state retailers from the foreign states that seek to conscript them into their tax-collection services.

3. As all of that underscores, there is no reason to reconsider the physical presence test in the first place. But this case would be a particularly poor candidate for abandoning the ordinary operation of *stare decisis* even if there were. First, it is axiomatic that "the demands of [*stare decisis*] are 'at their acme ... where reliance interests are involved.'" *Quill*, 504 U.S. at 320 (Scalia, J., concurring in part and concurring in the judgment) (second alteration in original) (quoting

Payne v. Tennessee, 501 U.S. 808, 828 (1991)). And there can be no question that hundreds of thousands of private parties (if not more) have ordered their affairs in reliance on the rule of *Quill* and *Bellas Hess*. Indeed, what was true in 1992—that "the *Bellas Hess* rule ha[d] engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry," *id.* at 317 (majority opinion)—has become only more true in the intervening decades, especially after the Court expressly declined to abandon the physical presence requirement in *Quill*.

Second, unlike in most constitutional cases, this Court is not the ultimate arbiter of this dispute. "Congress has the final say over regulation of interstate commerce." *Id.* at 320 (Scalia, J., concurring in part and concurring in the judgment). "[T]he doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what [the Court has] done.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Moreover, not only does Congress retain the power to alter the status quo; Congress is also "better qualified to resolve" whether it is necessary to do so. *Id.* at 318 (majority opinion).

That is particularly true when one considers the fundamental problem of states imposing regulatory burdens on out-of-state retailers. Those out-of-state retailers, especially small ones, have no voice in the halls of state legislatures, let alone city halls and tribal councils of thousands of taxing jurisdictions. But they at least have a shot at getting their voice heard in Congress. Every e-retailer in the United States is at home somewhere, and has a Member or Senator potentially able to take up their cause.

Indeed, the genius of the Framers, as reflected in the Commerce Clause and Import-Export Clause, is to limit state taxing and regulatory power unless and until Congress, where everyone has a voice, approves it—and by the same token, to place in the single body representative to all the power and obligation to protect interstate actors from locally motivated regulation.

Petitioner thus draws the wrong conclusion from the fact that Congress has considered legislation addressing the issue several times over the years but so far has declined to alter the status quo. *See, e.g.*, S. 1832, 112th Cong. (2011); H.R. 5660, 111th Cong. (2010); S. 1736, 108th Cong. (2003). Petitioner may see that as a failure to address the issue. But particularly given the countless hours Congress has spent studying, considering, and debating the issue, one can equally read that as a representative Congress protecting the liberty and the sovereign interests of *all* states.[3] Offloading tax-collection burdens on outsiders is easy; passing federal legislation is hard. But the Framers made passing legislation hard for a reason, and the physical presence rule of *Bellas Hess* and *Quill* stands as an obstacle to imposing burdens on those

---

[3] Notably, not every state even has sales or use taxes. Allowing foreign jurisdictions to impose tax-collection obligations on sellers based in states that do not would be both fundamentally unfair and fundamentally antithetical to the experimentation our federalist system is intended to foster. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

without so much as a physical presence or meaningful voice in the state. That is a powerful reason to retain the rule.

None of this is to suggest that the physical presence requirement is a perfect test, or even that mooring this obstacle to taxation without representation to the Commerce Clause was correct as an original matter. But it is a fair surmise that Justice Scalia—no fan of the dormant Commerce Clause—would not have embraced the rule of *Bellas Hess* as an original matter, and yet he embraced it as a matter of *stare decisis*. All of the reasons he offered in *Quill* remain valid today; two deserve special mention. First, as discussed, the rule remains bright and administrable. Even more important, however, the physical presence rule continues to serve as a protection against taxation without representation. Physical presence may not be a perfect proxy for having a sufficient voice in the polity to ensure that unpopular tax-collection burdens, but it is a fair proxy, and a clear one. Petitioner has presented no valid reason to abandon it.

B. If the Court Is to Reconsider the *Bellas Hess* Rule, It Should Also Reconsider Whether Other Constitutional Constraints Compel the Same Result.

In all events, if the Court is going to decide the Commerce Clause question on a clean slate, there is no reason not to consider the entire matter afresh. The fact that the physical presence rule of *Bellas Hess* has been the governing law for 50 years has prevented states from yielding to the obvious temptation to offload unpleasant tax-collection responsibilities on

political outsiders. It has also obviated the need for the Court to consider whether other possible constraints on comparable state action have an even firmer basis in the Constitution. *Cf. Hudson v. United States*, 522 U.S. 93 (1997) (disavowing *United States v. Halper*, 490 U.S. 435 (1989), but noting that "some of the ills at which *Halper* was directed are addressed by other constitutional provisions"); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 798-805 (1994) (Scalia, J., dissenting) (advocating "put[ting] the *Halper* genie back in the bottle" in light of the "perfectly clear" "text of the Constitution").

As Justice Scalia noted in his *Quill* concurrence, "[a]s an original matter, it might have been possible to distinguish between jurisdiction to tax and jurisdiction to compel collection of taxes as agent for the State," but the Court has treated them as the one and the same. 504 U.S. at 319 (Scalia, J., concurring in part and concurring in the judgment); *see, e.g., Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 558 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960). By adhering to the physical presence rule as a matter of *stare decisis*, Justice Scalia obviated the need to consider that distinction "as an original matter." But if *Bellas Hess* is to be reexamined, there is no reason to let the false equivalence between jurisdiction to tax and jurisdiction to conscript as a collection agent go unexamined.

The latter power is far more problematic, in that it offloads one of government's least popular responsibilities onto political outsiders; is generally backed with substantial potential liability for failing to properly collect and account; and intertwines the

state and out-of-state retailers in a way that the power to tax does not. While the state can surely impose those kinds of responsibilities on someone who is at home in the state (in a manner that would satisfy the requirements for general jurisdiction, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760-62 (2014)), the ability to impose those onerous responsibilities on an out-of-state retailer based on nothing more than the minimum contacts necessary to tax them (akin to specific jurisdiction for the tax itself) is a category mistake. That mistake, moreover, is particularly evident when it comes to remote retailers that are not just out-of-state, but out-of-nation. It is one thing to impose a tax on those foreign citizens, *cf.* Baker.Br.8-15, but quite another matter to conscript a foreign citizen as a tax collector for state and local jurisdictions in this country. "As an original matter," that is a far more problematic and burdensome assertion of extraterritorial jurisdiction.

Moreover, at the same time that the Court's decisions rest on a false equivalence between "jurisdiction to tax and jurisdiction to compel collection of taxes as agent of the State," the Court's decisions simultaneously rest on there being a critical difference between the two. This Court has never held that a state can tax an out-of-state transaction that truly occurs out of state just because the transaction involves one of its citizens. *Cf. Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (states may not "require[] the payment of royalties" for sales by in-state residents that nonetheless "'take[] place wholly outside of the State's borders'" (quoting *Healy*, 491 U.S. at 336)). Instead, states have been allowed to evade limits on their extraterritorial taxing

jurisdiction by conceptualizing the tax as a sales or use tax imposed in-state on state residents. But it makes little sense, at least "as an original matter," to allow a state that could not directly tax an out-of-state retailer for its half of an out-of-state sale to conscript the very same out-of-state retailer as tax collector for the in-state half of the transaction.

The only thing that has prevented that illogic from circumventing sensible limits on states' territorial jurisdiction is the physical presence rule of *Bellas Hess* and *Quill*. Thus, if the Court is going to reexamine and jettison that liberty preserving rule as a Commerce Clause matter, that should be the beginning, not the end, of the Court's analysis of whether a law like South Dakota's is consistent with the Constitution.

C. At a Minimum, the Court Should Reaffirm the Critical Due Process Constraints on States' Power to Regulate Beyond Their Borders.

In all events, even if this Court is not inclined to consider the constitutional limits on the states' regulatory jurisdiction on an entirely clean slate, at a bare minimum, it should reaffirm the limits that the Court's due process doctrine imposes on remote regulation. Indeed, the increased ease with which states can regulate out-of-state vendors in the twenty-first century makes it critical to do so.

1. The Fourteenth Amendment prohibits states from depriving persons of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. Before a state may impose tax-collection or other regulatory obligations on a remote seller, due process

requires, at a minimum, *see supra* Part II.B (arguing that tax-collection responsibilities should require a greater showing akin to that required for general jurisdiction), that the seller "purposefully avail[] itself" of the benefits of the state's economic market. *J. McIntyre*, 564 U.S. at 877 (plurality opinion). Due process also "requires a forum-by-forum, or sovereign-by-sovereign, analysis," *id.* at 884, which means that a seller must have purposefully availed itself of *each* taxing state to be subject to that state's taxing authority.

In some circumstances—*e.g.*, where it creates a "substantial connection" with the forum—a private party's single act may give rise to a foreign state's regulatory authority. *See, e.g.*, *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (ongoing life insurance contract). But "the Court ... has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place." *J. McIntyre*, 564 U.S. at 888-89 (Breyer, J., concurring). Indeed, *Quill* itself makes clear that an out-of-state retailer's mere delivery of an item to another state does not give rise to sufficient minimum contacts for due process purposes: If delivery were sufficient, then Quill's status as a mail-order retailer would have been dispositive.

Moreover, even repeated contacts with a state are not necessarily enough to give rise to jurisdiction for due process purposes. While "parties who reach out beyond one state and create continuing relationships

and obligations with citizens of another state" satisfy purposeful availment, if the "nature and quality and the circumstances of their commission create only an attenuated affiliation with the forum," then an actor cannot be said to have purposefully availed itself of the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 475 n.18 (1985). In short, it is the quality, not just the quantity, of contacts with the taxing state that ultimately controls the due process analysis.

2. Those principles apply with no less—and indeed, arguably more—force in the Internet age. Despite the undeniable fact that the Internet has made it easier to do business across state lines, "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on ... personal jurisdiction." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Now as before, "the principal inquiry" remains "whether the defendant's activities manifest an intention to submit to the power of a sovereign." *J. McIntyre*, 564 U.S. at 882 (plurality opinion).

That a remote seller's website is accessible in a state hardly ends that inquiry, for the "mere operation of a commercially interactive web site" does not show "that the [operator] 'purposefully availed' itself of conducting activity in the forum state." *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003). After all, an e-retailer's sale to a resident of a state touches that state "only because that is where the purchaser happened to reside," *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008), and that sort of "random, isolated, or fortuitous" contact is insufficient for due process. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). Indeed, with e-commerce, the

purposeful availment often runs in the other direction, with the consumer in search of a niche product diligently tracking down a website operated in a distant state or foreign country. The critical question is thus whether the business "directly target[ed] its web site to the state, knowingly interacting with residents of the forum state via its web site," or whether it, in fact, was the other way around. *Toys "R" Us*, 318 F.3d at 454; *see also ALS Scan, Inc. v. Dig. Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

The United States contends that "e-commerce more closely resembles brick-and-mortar retail than it resembles commerce undertaken through mail-order catalogs" because "retail websites ... hold themselves out to the public as places ... where customers initiate transactions." Br. for the United States 27. That puzzling claim misses a fundamental distinction: Before it can make a single sale to a South Dakotan, the proprietor of a brick-and-mortar store has to make the conscious decision to open a store *in South Dakota*. That is obviously not true of the proprietor of an *online* store—any more than it is true of an out-of-state seller that sends catalogs to South Dakotans. An online retailer thus need not purposefully avail itself of South Dakota for a South Dakotan to purchase its wares any more than a mail-order retailer need purposefully avail itself of South Dakota for a South Dakotan to purchase its wares.

Indeed, if anything, e-commerce involves even less purposeful availment than sending catalogs to in-state residents, as a "website is not directed at customers in [any State], but instead is available to all

customers throughout the country who have access to the Internet." *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1281 (Fed. Cir. 2005). That is why courts have consistently rejected the conclusion that merely placing an item for sale online constitutes "purposeful availment" of the benefits and protections of the laws of the state where the purchaser happens to reside.

And the lack of contact between the remote seller and the taxing state is starkest when an item is placed for sale on a third-party marketplace or auction website. There are millions of small-volume sellers online, all of which "are too small to measure activities at a unique web site," and so instead sell via eBay.com and other platforms. Joe Bailey et al., *The Long Tail Is Longer Than You Think: The Surprisingly Large Extent of Online Sales by Small Volume Sellers* 5, 7 (May 12, 2008) (unpublished working paper) (on file with the University of Maryland). Efforts by remote jurisdictions to tax such small-volume sellers would raise serious due process problems.

Nor would forcing the platform itself to satisfy the remote sellers' state tax-collection obligations solve the constitutional problem. To the contrary, it would simply substitute one due process problem for another. This Court has "treated a nominally private entity as a state actor"—and thus allowed constitutional challenges based on its actions—when the nominally private entity "has been delegated a public function by the State, ... when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S.

288, 295-96 (2001) (alteration in original) (quoting *Evans v. Norton*, 382 U.S. 296, 301-02 (1966)). It is difficult to imagine a more core public function than the collection of taxes. *Evans*, for instance, held that "the service rendered" by the private operation of a private park was "municipal in nature" for purposes of the state-action doctrine. 382 U.S. at 301-02. Relying on private platforms to collect taxes is *a fortiori* delegating a public function. And unlike the collection of state sales taxes by in-state retailers, who can exercise meaningful political will in favor of (or against) their (dis)favored tax policies, there is no such accountability when it comes to forcing remote retailers to act as arms of the state. As a result, any state efforts to turn national platforms into mini-government tax-collection agencies would raise serious due process concerns of their own.

3. Perhaps recognizing that, like e-retailers themselves, remote vendors' contacts with a taxing jurisdiction come in all shapes and sizes, petitioner consistently emphasizes the particular contact requirements of South Dakota's Senate Bill 106. But those requirements were gerrymandered with this litigation in mind. *See* Tony Mauro, *How Supreme Court's Internet Tax Case Was Built 'From the Ground Up'*, Nat'l L. J. (Mar. 16, 2018), https://bit.ly/2q1Af67 (noting that petitioner's counsel "designed the legislation" at issue in this case, "[g]ot the legislation passed," and even "timed the case from the enactment of the legislation, all the way through" the certiorari and merits stages before this Court).

It should be no great surprise that a law specifically designed to take down the physical

presence requirement would be directed at the Wayfair.coms of the world. But if this highly-engineered statute succeeds in its objective and takes out the physical presence requirement, there will be little in this Court's Commerce Clause jurisprudence to prevent other jurisdictions from treating any sale as a basis for imposing tax-collection responsibilities. Thus, if this Court is inclined to jettison the physical presence rule that has protected small out-of-state retailers for half a century, it is vital that it reaffirm that the Due Process Clause remains a bulwark against efforts to treat any Internet sale as a basis for state regulation.

In the end, South Dakota's elaborate effort to limit its statute to out-of-state sellers with a specific volume or number of sales only illustrates the virtues of a legislative solution. Unlike this Court, a legislature can tailor its approach and differentiate between large and small retailers, and between prospective and retroactive burdens. The problem is that the *wrong* legislative body is addressing this problem. Small out-of-state retailers have no voice in the South Dakota legislature. If the *Bellas Hess* rule is eliminated, state legislatures will no longer have any reason to assure this Court of their reasonableness, and will have no reason to be restrained in offloading unpopular tax-collection responsibilities on out-of-state retailers with no voice in the state capital. By contrast, if Congress addresses this problem, which is (at least) national in scope, then everyone—states, retailers big and small, and taxpayers alike—will have a voice. Given the enduring need to prevent taxation without representation, leaving this issue to that representative body is a far better solution than

jettisoning the one obstacle that has prevented states from imposing regulatory burdens on out-of-state retailers with no physical presence in the state and no voice in the state legislative process.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

April 4, 2018